

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

FEB 28 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	
)	
Closed Captioning and Video Description)	
of Video Programming)	MM Docket No. 95-176
)	
Implementation of Section 305 of the)	
Telecommunications Act of 1996)	
)	
Video Programming Availability)	

COMMENTS OF ENCORE MEDIA CORPORATION

J. Steven Beabout
Senior Vice President for Law and
Administration
Yvonne Rena Bennett
Vice President, Business Affairs and
General Counsel
Richard H. Waysdorf
Corporate Counsel, Affiliate Relations

Encore Media Corporation
Suite 600
5445 DTC Parkway
Englewood, CO 80111
Telephone: (303) 771-7700

February 28, 1997

No. of Copies rec'd
List ABCDE

0211

Table of Contents

I.	EMC’s Premium Programming Services and Closed Captioning Efforts	1
II.	Summary of EMC’s Comments	3
III.	Responsibilities for Captioning of Programming	5
IV.	Captioning Requirements for Newly-Produced Programming	8
V.	Captioning of Older Programming	10
VI.	Exemptions for Types of Programming	12
	A. Instructional Educational Programming	12
	B. Interstitial Program Segments	13
VIII.	Exemptions for “Existing Contracts”	14
IX.	Exemptions Based on the “Undue Burden” Standard	17
X.	Recordkeeping Requirements	18
XI.	Conclusion	18

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Closed Captioning and Video Description)	
of Video Programming)	MM Docket No. 95-176
)	
Implementation of Section 305 of the)	
Telecommunications Act of 1996)	
)	
Video Programming Availability)	

COMMENTS OF ENCORE MEDIA CORPORATION

Encore Media Corporation (“EMC”) submits these comments in response to the Commission’s Notice of Proposed Rulemaking, FCC 97-4, released January 17, 1997 (“NPRM”), in this proceeding. EMC is one of the largest providers of programming networks to multichannel video distributors, including cable, DBS, wireless cable, TVRO, and SMATV operators. EMC recognizes the importance of serving consumers with hearing impairments, and offers its views and information as requested by the Commission in its effort to establish rules for captioning of video programming.

I. EMC’s Premium Programming Services and Closed Captioning Efforts

EMC provides the following channels of commercial-free programming services to multichannel video programming distributors (MVPDs):

“ENCORE,” consisting primarily of movies that first were released in the 1960s, 1970s, and 1980s, and movies that, in most case will appear four or more years after their original theatrical releases;

ENCORE's "Thematic Multiplex Channels," comprised of six separate channels each with a common subject theme, Love Stories-encore 2, Westerns-encore 3, Mystery-encore 4, Action-encore 5, True Stories and Drama-encore 6, and WAM!America's Kidz Network-encore 7;

"plex-encore 1," consisting of alternating days of ENCORE and each of the Thematic Multiplex Channels in a single channel;

ENCORE's "First Run Multiplex," "STARZ!-encore 8," which features, in addition to ENCORE titles, exclusive first-run, uncut feature films from studios such as Universal Pictures, Touchstone Pictures, Hollywood Pictures, New Line Cinema, Miramax Films, Fine Line features, and other studios and distributors; and

ENCORE's "BET Movies/STARZ!3-encore 8," which is a multiplex of ENCORE and STARZ!-encore 8 featuring films directed by or starring African-American artists.

EMC also provides several additional feeds of these channels. With the exception of Thematic Multiplex Channel WAM!America's Kidz Network, all of EMC's current channels share a primary focus on theatrically-released feature films for the great preponderance of their programming. WAM!America's Kidz Network's schedule includes a substantial number of feature films, but also includes several hours of instructional educational programming each day, as well as several hours of entertainment and informational series aimed at the target audience of 8 to 16 year olds. The movie-oriented channels also contain a limited amount of short-form promotional and informational interstitial programming, and STARZ!-encore 8 also airs a limited number of original STARZ!-produced movies each year. Otherwise, the focus of EMC's channels is theatrical feature films produced by major and minor American and international film studios.

II. Summary of EMC's Comments

EMC always transmits the closed captioning provided by producers and distributors with the programming it exhibits. As has been suggested in comments filed at an earlier stage of this proceeding by the Motion Picture Association of America, Inc. ("MPAA"), the great majority of feature films currently being released by the major studios which comprise MPAA's members already contain closed captioning for the hearing impaired when they leave the studios in final form. Thus with respect to such films now being released by the major studios (and certainly by the effective date of any rules promulgated by the Commission), captioning is already being provided to the hearing-impaired. However, feature films currently being released by "independent" film studios and producers are not uniformly already closed captioned by their producers. But in general, for much of the movie programming first theatrically released after the proposed rules' effective date, closed captioning will be provided well ahead of the schedule proposed by the rules.

EMC's primary concern in the area of programming first exhibited after the rules take effect is with respect to promotional and informational "interstitial" programming. There are many different forms of such promotional interstitial programming, but the unifying characteristics are: (i) that this material is much shorter in duration than the typical minimum programming block of thirty minutes; (ii) that this material is often produced just before airing and sometimes at the moment of broadcast; and (iii) that this material's content and thus its value is generally extremely fleeting, so that there is no ability to recoup captioning costs over repeated showings. EMC proposes that the Commission should exempt all interstitials,

including but not limited to scheduling announcements, program introductions, and short-form promotional segments.

For programming first theatrically exhibited before the effective date of the new rules, captioning is much less common. Because of the broad range of economic and ownership rights considerations that affect the captioning of older programming, the Commission should not require captioning of such “library” programming. In general, as EMC’s programming services continue to exhibit newer and newer releases, EMC expects the proportion of programming with closed captioning to continue to increase. However, at this time, very little programming produced more than ten years ago has been captioned.

Additionally, the duration of contracts between networks and studios for library films is typically rather long, usually seven years, and these contracts do not allow for early termination on the basis that the movies mostly are not captioned. Moreover, given the limited number of feature film distributors and the demand for film product, even if EMC had such rights, it could not afford to terminate large film package agreements and lose large blocks of film titles that are the lifeblood of EMC’s ten movie channels. Nor does EMC typically have the right under its contracts with film distributors to create a new captioned version of the movies that are involved in these library contracts; rather, the contracts generally provide EMC with very limited exhibition rights and either expressly prohibit any alteration by EMC or reserve to the distributor all rights not expressly granted (i.e., only limited exhibition rights). Moreover, even where there is no express prohibition against altering a film, the right to create new versions of a film (i.e., a derivative work) is not typically implied in studio licensing agreements. These ownership and economic considerations regarding library movies support

the Commission's proposal to take a more restrained approach in required captioning of older programming.

With this overview, EMC will now address the more specific questions posed in the NPRM.

III. Responsibilities for Captioning of Programming

The NPRM at paragraph 28 proposes that the primary burden of providing captioning and of complying with the required minimum amounts of captioned programming should rest on the services which ultimately provide programming to the public: broadcasters and multichannel video program distributors such as cable systems, wireless cable systems, DBS satellite systems, SMATV systems, and home satellite dish (TVRO) program packagers. The NPRM asserts that the "programming providers are in the best position to ensure that the programming they distribute is closed captioned because of their role in purchasing of programming from producers. For example, a provider can refuse to purchase programming that is not closed captioned." However, the NPRM "recognize[s] that, from a practical standpoint, captioning at the production stage is often the most efficient manner to include closed captioning with video programming." Id. at para. 30. Nonetheless, the NPRM asserts that placing the primary responsibility and enforcement burden on the broadcasters, cable systems, and DBS systems "will result in video programming providers incorporating such requirements into their contracts with video providers and owners, regardless of which party has the obligation to comply with our rules."

While this concept of "trickle-up" responsibility for captioning may be appealing, the reality is that both large groups of programs and in turn program networks are licensed in very

long term contracts, not on an individual, single program basis. Neither networks nor MVPDs can simply “refuse to purchase” a particular program depending on whether it is captioned or not. As noted above, contracts between studios and programming networks are typically seven or more years in duration, as are contracts between program networks and MVPDs. To not accept a particular movie or program may mean either a breach of the long-term contract or a need to find other programming to fill a spot at considerable, duplicative expense. The NPRM’s simplistic assertion that an MVPD may simply “refuse to purchase” a particular uncaptioned program ignores the manner in which the marketplace actually operates.

Indeed, even after the current contracts expire several years from now, the playing field envisioned by the Commission will not exist for several critical reasons. First, the programming marketplace, for films and otherwise, is largely a seller’s market, where there are many potential buyers for a limited number of higher quality programs. Especially with more and more program networks coming into existence, the leverage and bargaining power is heavily weighted toward the studios and producers. If a program network desires to stay in business and provide consumers with the type of quality programming they desire (with big stars and big budgets), it does not realistically or competitively have the luxury of refusing to buy such high quality films even if the studios and producers refuse to caption them.

Additionally, where a program service must purchase large numbers of films to fill its schedules, such films must typically be purchased in large packages of titles in order to obtain volume discounts from the studios. While such individual films may be sold for separate license fees, without such volume discounts for library packages (including both captioned and

uncaptioned films), it would be prohibitively expensive to operate a movie channel like those operated by EMC.

Moreover, as the Commission has recognized, there is little economic incentive or efficiency to justify an entity other than the owner of a program to pay the cost of captioning a program. The MVPD or broadcaster has usually obtained the rights to only a few exhibitions of a program or film, and it is simply cost prohibitive for the MVPD or broadcaster to step in to comply with the captioning requirements, assuming it even has the legal right to do so.

Nonetheless, EMC recognizes, as has the Commission, that there are practical and jurisdictional problems in the Commission imposing affirmative captioning requirements directly on studios or program producers themselves. While the Commission at paragraph 29 of the NPRM noted that the reference in Section 713 of the Telecommunications Act of 1996 to “program providers and owners . . . may have been intended to provide the Commission with jurisdiction over other parties in the production and distribution chain,” it is doubtful that this phrase alone represents a full and intentional grant of jurisdiction over entities that have previously only rarely been subjected to Commission jurisdiction. In addition, there is sometimes substantial difficulty in imposing sanctions and otherwise exercising enforcement powers against entities such as studios which hold no significant Commission licenses.

The result of these conflicting considerations is that if the Commission does adopt rules imposing the principal responsibility for captioning on broadcasters and MVPDs, then there must also be considerable tolerance under the rules in recognition that those upon whom the burden falls do not have very much control over the programs which must be captioned.

IV. Captioning Requirements for Newly-Produced Programming

The Commission has proposed that for programs “first published or exhibited after the effective date of the regulations,” mandatory captioning be phased in over a period of eight years, with 25% required to be captioned by two years after effective date, 50% by the end of four years, 75% by the end of six years, and 100% by the end of eight years. As an alternative, the NPRM seeks comment on whether there should be a longer phase-in period of ten years. EMC submits that for newly produced programming, although an eight-year phase-in period should be the absolute minimum, the ten-year schedule is preferable as it would further ease the burden on those responsible for captioning under the proposed rules.

EMC does suggest, however, that the Commission consider adopting a rule which ultimately requires that, at the end of the phase-in period, only 97% or at most 98% of newly-produced programming be closed captioned. Such a level of “substantial compliance” would obviate the need of the Commission to devote limited staff resources to ruling on isolated waivers or exemptions. A 2%-3% “cushion” would be adequate to allow for an isolated program or movie that cannot be captioned due to contractual or ownership problems, without requiring the Commission to become routinely involved in evaluating and ruling on waiver or exemption requests.

One matter which should be clarified by the Commission in promulgating final rules is the definition of the new programming subject to the mandatory captioning requirements. The statute suggests that optimum visual accessibility be provided for “video programming first published or exhibited after the effective date of such regulations” Section 713(b)(1) of the Telecommunications Act of 1996, 47 U.S.C. §613(b)(1). It must be assumed that for feature

films, the date such films were “first published or exhibited” would be that of their first exhibition in theaters (or on video if it skips theaters), not the first exhibition on television. The earlier date of theatrical exhibition is most relevant to the regulatory scheme contemplated by the Act because this cut-off was likely intended to relate to when production occurred. In this regard, the first theatrical exhibition of a film and the first broadcast appearance of a television series both follow a few months after production is completed, whereas the first broadcast appearance of a theatrical film on premium cable channels is usually at least one to two years after the completion of production. It does not appear that Congress intended the new rules to apply to programming where the production was completed one to two years before the new captioning rules take effect. Therefore, the Commission should consider that a theatrically-released feature film is “first exhibited” on the date it is first exhibited in theaters.

With respect to other questions raised in the NPRM regarding implementation of the captioning rules for newly-produced programming, EMC supports the Commission’s proposal that the captioning requirements for MVPDs be imposed on a system-wide basis rather than on a channel-by-channel basis. Application of the requirements on a system-wide basis would more reasonably allow for minor variations and anomalies among such channels, as well as for differences in captioning burdens between the types of programs that may be carried on different types of networks. For example, there may be much higher costs or substantial logistical problems involved in captioning live sporting or news events as compared to other types of programming. Applying the mandatory captioning requirements on a system-wide basis would allow such differences to average out, thereby easing the overall burden on the MVPD operator.

Similarly, the period of time for which the mandatory captioning compliance should be measured should be on a monthly basis, rather than weekly or daily basis. Minor anomalies and fluctuations from day to day or week to week would tend to average out in the time frame of a full month. Additionally, using a monthly standard would involve substantially less recordkeeping and/or certification burdens on both the broadcasters/MVPDs responsible for compliance and on the networks that supply them with programming.

V. Captioning of Older Programming

The NPRM proposes that for older programming first exhibited prior to the effective date of the rules, there should ultimately be a requirement that 75% of such programming be closed captioned. However, the NPRM proposes that there should be neither a deadline nor phase-in period for this requirement. EMC submits that there should be no mandatory captioning of older, library programming. However, if such a requirement is imposed, there should not be any phase-in period or deadline for such requirement.

The amount of material that is actually captioned decreases dramatically the older the programming involved. Very few feature films released before 1985 were closed captioned by even the major film studios. While there remains substantial viewer interest in films released before 1985, especially among ardent feature film audiences, the cost of now captioning a previously uncaptioned film is certainly not automatically assumed or paid by the present copyright owner. Rather, such copyright owner or rights holder, which may not be the studio which originally produced the film, has typically been very reluctant to invest more money in the old film.

With standard long-term contracts for film licensing, the program networks such as EMC's channels have no bargaining power to require the studios to make that investment in old films prior to the expiration of the current licensing contract, potentially several years down the road. Indeed, it will take seven or more years from now for many film license agreements currently in effect to expire. In other words, the programs on networks for the next seven years have largely already been bought, and the type of bargaining that the Commission envisions, where a consumer video provider could simply either require the supplier to caption the program or "refuse to buy" it, does not exist under current contracts and is unlikely to exist under future contracts and business realities.

As noted above at page 6, even after the current contracts expire several years from now, the playing field envisioned by the Commission will not exist. The programming marketplace is largely a seller's market, where there are many potential buyers for a limited number of higher quality programs. With the number of program networks growing, the bargaining power is heavily weighted toward the studios and producers. If a program network desires to provide consumers with the type of quality programming they desire, it does not realistically or competitively have the option of refusing to buy high quality programming, even if the studios and producers refuse to caption them. Further, as also noted above, where movie channels such as EMC's services must purchase large numbers of films to fill its schedules, such films must typically be purchased in large packages of titles in order to obtain volume discounts from the studios.

Under these circumstances, it is unduly burdensome on parties without any ownership in the programming to be required to invest in captioning of such library programs. Even over

time, the type of bargaining envisioned by the Commission, where an MVPD or broadcaster could simply either require the supplier to caption the program or “refuse to buy” it, will never take over the program licensing marketplace, and it is unrealistic to expect that this current marketplace system would be subject to change merely to conform to captioning requirements. Moreover, if the Commission were to adopt an eventual requirement of captioning of 75% of library programming as proposed in the NPRM, a rigid phase-in schedule as is proposed for newly-produced programming would be inappropriate for library programming, particularly in view of the long-term contracts that will not free up parties to buy or not buy individual programs or films based on captioning for several years to come.

VII. Exemptions for Types of Programming

The Act and the NPRM raise the question of whether certain types of programming ought to be exempt from required captioning. EMC supports the establishment of limited exemptions for two types of programming in particular: (i) instructional educational programming for children; and (ii) short-form promotional programming or interstitials of fifteen minutes duration or less.

A. Instructional Educational Programming

With respect to instructional educational programming for children, EMC notes initially that its children’s programming channel - WAM!America’s Kidz Network - is a completely commercial-free youth-oriented educational/entertainment network which devotes as substantial portion of its schedule each day to classroom-style instructional programming. This programming is produced on minimal budgets by institutions and other producers and presented

by WAM! as a public service to its subscribers. The cost of captioning such programming in most cases would be prohibitive for the producing institutions, as the cost of closed captioning such programs would actually exceed the license fees paid by EMC to the producers. EMC could not realistically pay for the closed captioning as that would increase the license fees by more than 100% in most cases.¹ Requiring producers or the network to incur the cost of captioning will directly result in substantially less such programming being produced and aired. Therefore, such programming as a rule should be exempt from the captioning requirements.

B. Interstitial Program Segments

The NPRM proposes at paragraph 79 that promotional and scheduling announcement interstitials be exempt from the captioning requirements for the reasons that most interstitials provide the basic information in textual form and that large numbers of such segments must be produced in short time periods. Thus the Commission tentatively concluded that the burden of requiring captioning of such segments outweighs the benefit of a mandatory requirement for captioning them. EMC supports this proposed exemption for the reasons stated by the Commission.

EMC's movie channels and other movie-oriented networks regularly use a variety of newly-produced promotional segments (i.e., interstitials) in between the films, which themselves are shown without interruption. As suggested by the Commission, these short promotional segments are often accompanied by material appearing in textual form on the screen. Usually these promotional segments focus on daily scheduling, publicity about

¹ EMC notes that in some instances, captioning has been provided for its educational programming where government grants have been obtained to defray the cost.

programming to appear on the channel, or other material of little or no lasting value. These interstitials have only marginal value to viewers and are not the basis on which viewers subscribe to the program service. Additionally, many of these interstitials are produced live or just shortly before airing on the network. As the Commission has recognized, captioning in real time involves significantly higher costs than captioning recorded material. It would be cost prohibitive for EMC to caption the large number of such interstitials it airs on its multiple channels each day.

The Commission should adopt a simple rule that exempts all interstitials as such promotional segments have marginal consumer value and no lasting value for repeat showings. There is no real value to consumers in captioning them, while there is a substantial financial burden to EMC in captioning them.

VIII. Exemptions for “Existing Contracts”

Section 712(d)(2) of the Telecommunications Act of 1996 exempts video programming providers or owners from the captioning requirements “if such captions would be inconsistent with contracts in effect on the date of enactment of the Telecommunications Act of 1996” The NPRM tentatively concludes at paragraph 87 that only “contracts which affirmatively prohibit closed captioning would fall within this exemption.” The proposed approach fails to consider the fundamental perspective of nearly all program and network licensing or Affiliation agreements, that is, that such agreements only grant to the licensee very limited exhibition rights, and specifically reserve to the copyright owner or distributor all rights not affirmatively granted in the limited license agreement. Other contracts may not expressly prohibit the licensee from creating a new captioned version of the film, but do expressly prohibit the

licensee from editing or altering the film in any way. Such a broad prohibition against making any alteration to a copyrighted work would likely be read by the licensor to prohibit the licensee, such as EMC, from creating a captioned version of the work. Moreover, even where EMC is granted a limited right to edit or where the contract is silent, the right to create new versions of a film (i.e., a derivative work) is not typically implied in studio contracts. Hence, even the presence of an editing right (which tends to be extremely limited when granted) does not imply a right to create derivative works.

Most of EMC's program contracts include broad prohibitions against EMC making any changes, modifications, or additions to the films covered by the contracts. For example, one of EMC's library agreements states that "Licensee shall not have the right to edit, alter (including but not limited to Exhibiting only a portion of a Licensed Film), time compress or expand any of the Licensed Films or any portion thereof." This same agreement also specifies that the "Licensor reserves the right to exploit the Licensed Films, the elements and parts thereof Licensor reserves all copyrights, and all the other rights in the images and sound embodied in the Licensed Films." The studios are characteristically vigilant in enforcing the rights limitations in their agreements, and these provisions could reasonably be read as prohibiting the creation of a new captioned version of the works covered by this contract by the licensee, EMC.

Another film library agreement similarly provides EMC with limited exhibition rights in the subject films, and then includes the following broad reservation of rights to the studio: "All licenses, rights and interest in, to and with respect to the Licensed Pictures, elements and parts thereof, and media of transmission not specifically granted herein to Licensee shall be, and

are specifically and entirely reserved to [the studio]” Finally, this agreement provides that “. . . neither Licensee nor any Affiliated System shall cut, edit, change, add to, delete from or revise any Licensed Picture” Again, EMC believes that there is a substantial risk that this studio would interpret these provisions as prohibiting the Licensee, EMC, from creating a new captioned version of a covered film. The rights to films exhibited by EMC’s networks are its most important properties; EMC cannot risk a default incurred by a violation of such provisions.

EMC submits that the Commission’s proposed interpretation of this statutory exemption is much too narrow, and that the types of contracts described above which either (i) grant limited exhibition rights and then reserve to the studio all rights not granted to the studio, or (ii) expressly prohibit a licensee from “editing or altering” a licensed film, should also come within the “inconsistent with current contracts” statutory exemption. Moreover, even where a program contract is silent as to the right of a licensee to caption a copyrighted film, it may be a violation of that copyright for the limited licensee to create a captioned version of that film. Under industry practice, a closed captioned film is considered to be a separate version of a film (similar to separate versions such as the airline, broadcast, or Spanish language versions). It is typically understood in the industry that a licensee is only entitled to versions for which it has received a specific grant. Therefore, even editing or alteration rights would not necessarily give a licensee such as EMC the right to create and/or exhibit an unauthorized version of the film. For this reason as well, the “existing contract” exemption should include any program whose contract does not expressly and affirmatively include the right of the licensee to create a captioned version. Indeed the language used in the statute that such pre-existing agreements merely be “inconsistent” with the captioning requirements to qualify for an exemption suggests

a much broader exemption than the strict “expressly prohibit captioning” standard suggested in the NPRM.

IX. Exemptions Based on the “Undue Burden” Standard

The statute also provides that the Commission may grant exemptions to the captioning requirements where, upon the filing of a petition by the owner or program provider, the Commission finds that the requirements would “result in an undue burden.” 47 U.S.C. §713(e). This provision includes four factors to be considered in determining whether an “undue burden” exists.²

The NPRM seeks comment on whether factors in addition to those listed in the statute should be considered in evaluating an “undue burden” exemption request, and also how these standards should be applied. EMC suggests that the Commission defer setting by rule more specific standards for undue burden exemptions. By nature, such exemptions should be left to be dictated by circumstances, without limits set in advance by Commission regulations. The Commission cannot and should not attempt to anticipate every type of situation that might appropriately qualify for this “general hardship” exemption. Drafting too narrow a rule might inappropriately exclude true hardships of a type that was not foreseen. Rather, the Commission should see what waiver or exemption petitions are filed, if any, under these provisions, and issue individual rulings limited to the facts presented.

² These factors to be considered are:

- (1) the nature and cost of the closed captioning for the programming;
- (2) the impact on the operation of the provider or program owner;
- (3) the financial resources of the provider or program owner; and
- (4) the type of operations of the provider or program owner.

X. Recordkeeping Requirements

Without setting forth specific rules for comment, the NPRM does ask whether there should be a requirement that “each entity responsible for compliance” with the captioning rules retain in a file open for public inspection, or merely keep on hand for Commission inspection only, sufficient records to demonstrate compliance with the captioning rules. EMC suggests that any recordkeeping requirements be kept to the bare minimum necessary for enforcement of the new rules. Where MVPDs are involved, the recordkeeping for each of fifty to a hundred or more channels could be overwhelming. The rules should allow as one recordkeeping option that MVPDs may reasonably rely on simple annual or monthly certifications of compliance supplied to them by each program network, attesting that such network’s programming complies with the rules. Only where a formal complaint has been filed and a prima facie case established by the complainant that the rules have been violated should an MVPD and the parties up the licensing chain be required to provide documentation or other proof to support the certification of compliance. Certifications of compliance have been successfully relied upon by the Commission in many similar enforcement contexts.

XI. Conclusion

Over the past few years, EMC, like most other program network providers, has dramatically increased the amount of captioned programming it airs. Certainly over the next decade, the great majority of feature films EMC’s channels air, whether first exhibited before or after the new captioning rules’ effective date, will be closed captioned for the hearing impaired. Nonetheless, the captioning requirements, especially if imposed in the first instance

on MVPDs and broadcasters, must take into account the fact that neither the MVPDs themselves nor the networks that supply them with programming actually own that programming and thus these parties have limited rights to caption that programming themselves, and the costs of captioning in many cases would be prohibitive to the networks' ability to continue to provide high quality programming to MVPDs and ultimately to subscribers at consumer-friendly rates. Additionally, such programming rights and program services are often licensed under long term agreements that will not expire for several years to come. Thus the rules adopted by the Commission must provide the parties with flexible time schedules for implementation of captioning obligations.

Respectfully submitted,

ENCORE MEDIA CORPORATION

By Richard H. Waysdorf
J. Steven Beabout, *THB*
Senior Vice President for Law and
Administration
Yvonne Rena Bennett,
Vice President, Business Affairs and
General Counsel
Richard H. Waysdorf,
Corporate Counsel, Affiliate Relations

Encore Media Corporation
Suite 600
5445 DTC Parkway
Englewood, CO 80111
Telephone: (303) 771-7700

February 28, 1997